UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

UNITEDHEALTH GROUP, INC. and
UNITEDHEALTH CARE SERVICES INC.

and **Case No. 02-CA-118724**

CARLOS AVILES, SEYNABOU BA,
CHERRIE BLACKMAN, SIRO BRENES,
ROBERT BURNETT, RUBEN DEJESUS,
DENNIS EDWARDS, VICTOR FELICIANO,
MARIA FONSECA, CLAUDIE FOUTIKA,
LISANDRO GALVAN, ROSA GARCIA,
MOHAMED HAQUE, DANIELLE HERARD,
MONIKA KRYNSKA, TAMIKA LEWIS,
FIORDALISA MARTE, SETOU MCCLENDON,
CARMELITA RATNA, VICTOR SERRANO,
CARMILO SUAREZ, JANIRA TORRES,
AND MIRRIAN ZELAYA

***Julie Polakoski-Rennie, Esq.*, Counsel for the**
the General Counsel
Peter A. Walker, Esq., Christopher H. Lowe, Esq.
and *Lori M. Meyers, Esq.,* (Seyfarth Shaw LLP),
for the Respondent.

DECISION

Raymond P. Green, Administrative Law Judge. This case was presented to me by way of a stipulated record.[1] The charge was filed by Outten & Golden LLP, counsel for the Charging Parties named above in the caption on December 10, 2013 and served on December 11, 2013. The amended charge was filed on December 10, 2013 and served on April 16, 2014. The Complaint was issued by the Regional Director on January 31, 2014.

Findings and Conclusions

I. Jurisdiction

The Respondents admit and I find that they are employers engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. [2]

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[1] By entering into the Stipulation, the parties agreed that the facts contained therein are true, albeit the parties do not concede the relevance of each fact recited. Each party reserved the right to make objections to the relevance of any fact stated.

[2] The Respondents and the General Counsel reserved their respective positions as to whether the Respondents and any subsidiaries applying the UnitedHealth Group Employment Arbitration Policy are or are not joint employers. They agree that in light of the stipulated record, it is unnecessary to litigate this issue or make any findings of fact or conclusions of law as to it.

II. The Alleged Unfair Labor Practice

The stipulated facts are as follows:

Since at least September 2007, the Respondents have promulgated and maintained individual arbitration agreements entitled "UnitedHealth Group Employment Arbitration Policy" with its current and former employees and the current and former employees or its subsidiaries. A copy of an exemplar agreement, at times referred to herein as the Arbitration Agreement, is attached to the Stipulation as Exhibit G.

In pertinent part, the Arbitration policy as set forth in Exhibit G to the Stipulation; this being the document signed by Carlos J Aviles on April 3, 2012, states:

> Statement of Intent
> UnitedHealth Group… acknowledges that disagreements may arise between an individual employee and UnitedHealth Group or between employees in a context that involves UnitedHealth Group. UnitedHealth Group believes that the resolution of such disagreements is best accomplished through internal dispute resolution (IDR) and where that fails by arbitration administered through the American Arbitration Association (AAA)….
>
> This policy is a binding contract between UnitedHealth Group and its employees. Acceptance of employment or continuation of employment with UnitedHealth Group is deemed to be acceptance of this Policy. However, this Policy is not a promise that employee will continue for any specified period of time or end only under certain condition. Employment at UnitedHealth Group is a voluntary (at will) relationship existing for no definite period of time and this Policy does not change that relationship
>
> Scope of Policy
> The agreement between each individual employee and UnitedHealth Group to be bound by the Policy creates a contract requiring both parties to resolve most employment-related disputes (excluding disputes are listed below) that are based on a legal claim through final and binding arbitration. Arbitration is the exclusive forum for the resolution of such disputes and the parties mutually waive their rights to a trial before a judge or jury in federal or state court in favor of arbitration under the Policy.
>
> The disputes covered by this Policy include any dispute between an employer and any other person where (1) the employee seeks to hold UnitedHealth Group liable on account of the other person's conduct, or (2) the other person is also covered by this Policy and the dispute arises from or relates to employment, including termination of employment with UnitedHealth Group. The disputes covered under the Policy also include any dispute UnitedHealth Group might have with a current or former employee which arises or relates to employment.
>
> * * *
>
> A dispute is based on a legal claim and is subject to this Policy if it arises from or involves a claim under any federal, state or local statute, ordinance, regulation or common law doctrine regarding or relating to employment

> discrimination, terms and conditions of employment, or termination of employment including, but not limited to the following: Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Family and Medical Leave Act, the Fair Labor Standards Act and all applicable amendments and regulations, state human rights and non-discrimination laws; whistleblower or retaliation claims, breach of contract, promissory estoppels, or any other contract claim, and defamation, employment negligence, or any other tort claim not specifically excluded from coverage. Claims excluded from arbitration under the Policy are claims for severance benefits under the UnitedHealth Group Severance Pay Plan, claims for benefits under UnitedHealth Group other ERISA benefit plans and claims for benefits under UnitedHealth Group's Short-Term Disability Plan. A separate policy applies to certain of these benefit-related claims…. [3]
>
> Any dispute covered by this policy will be arbitrated on an individual basis. No dispute between an employee and UnitedHealth group may be consolidated or joined with a dispute between any other employee and UnitedHealth group, nor may an individual employee seek to bring his/her dispute on behalf of other employees as a class or collective action. Any arbitration ruling by an arbitrator consolidating the disputes of two or more employees or allowing class or collective action arbitration would be contrary to the intent of this Policy and would be subject to immediate judicial review.
>
> This Policy does not preclude an employee from filing a claim or charge with a governmental administrative agency, such as the National Labor Relations Board, the Department of Labor, and the Equal Employment Opportunity Commission, or from filing a workers' compensation or unemployment compensation claim in a statutorily specified forum In addition, this Policy does not preclude either an employee or UnitedHealth Group from seeking emergency or temporary injunctive relief in a court of law in accordance with applicable law. However, after the court has issued a ruling concerning the emergency or temporary injunctive relief, the employee and UnitedHealth Group are required to submit the dispute to arbitration pursuant to this Policy.

The Policy goes on to describe the procedures relating to the arbitration process. For example, it permits either side to compel pre-trial disclosure in the form of interrogatories, requests for the production of documents, the taking of depositions, and the requirement for submission to mental and physical examinations. It also provides for the filing of post hearing briefs. Thus, in substantial respects, the procedure outlined in the Policy mimics that of a civil trial held in a federal or state court. And unless we are exaggerating the knowledge or skill set of lawyers, we can assume that having competent legal counsel would be advisable for any individual who seeks to utilize this procedure.

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[3] Exhibit H to the Stipulation which is entitled "Employment Arbitration Policy" indicates that its effective date is October 2, 1995. It differs in some respects from Exhibit G which was executed in 2013 by an employee. Among other things, it excludes from mandatory arbitration a number of claim types that are not excluded in Exhibit G. For example it excludes from mandatory arbitration, *inter alia*, claims under Title VII of the Civil Rights Act of 1964, or any tort related to or arising out of sexual assault or harassment, false imprisonment claims, negligent hiring claims and claims arising pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act.

As to costs, the Policy basically allows an individual who files with the AAA to pay only a $25 filing fee. In the event that the arbitration is initiated by the Employer, the Policy states that it will pay 100% of the administrative fees. [4] It further states (a) that expenses of witnesses for either said shall be paid by the party requiring the presence of such witness; and (b) that each side shall pay its own legal fees and expenses, except where such legal fees and expenses may be awarded under applicable law. The Policy goes on to state that all other expenses (except Postponement Fees or Additional Hearing Fees resulting from the actions or inactions of the employee or employee's representative), of the arbitration, such as required travel and other expenses of the arbitrator (including any witness produced at the direction of the arbitrator), and the expenses of a representative of AAA, if any, shall be paid completely by UnitedHealth Group. It goes on to state that if the arbitrator finds that either party's demand for arbitration is frivolous, or vexations, or not filed in good faith, he may require the offending party to reimburse the other party for the arbitrator's expenses. Written in a manner perhaps understandable by persons having a legal degree, I don't think that this section of the Policy actually states or describes who will be responsible for paying the arbitrator's fee, typically at about a $1000 per day. (Expenses are not the same thing as fees).

I don't know the wage scales of the employees who are required to sign this document as a condition of retaining their jobs, or the wage scales of those individuals who are the Charging Parties in this case. But, it seems obvious to me that unless they are highly paid individuals, such as high level or senior level managers, having annual earnings of at least six figures, the cost structure of the Policy would clearly place employees at a substantial disadvantage vis a vis the company, even assuming that such employee would even be able to pay for legal representation. As such, it is probable that many employees if they were compelled to arbitrate, on a non-class basis, their employment related claims, including wage and hour claims under Federal or State statutes, they would find themselves effectively precluded from vindicating statutory rights through non-governmentally initiated legal action.

Nevertheless, considerations of cost or equity may not be a relevant consideration and in this respect, the Respondents cite *American Express Co. v. Italian Colors Rest.,* U.S., No. 12-133, 6/20/13, in which the Supreme Court held that a class action waiver in a commercial arbitration agreement between American Express Co. and merchants accepting the company's credit cards is enforceable under the Federal Arbitration Act *even if individual arbitration claims of alleged antitrust violations would be too expensive to pursue*. The Court's majority opinion stated that the Federal Arbitration Act does not permit a court to invalidate a contractual waiver of class arbitration because a plaintiff's costs in individually arbitrating a federal statutory claim would exceed any potential recovery.

Since at least September 2007 and currently, the Respondents have required their employees and the employees of their subsidiaries to enter into the Arbitration Agreements described above.

The following employees are among those of Respondents employees who signed the Arbitration Agreement.

[4] If an employee or group of employees files a lawsuit and the employer seeks to have the lawsuit dismissed and to compel arbitration under this Policy, does this mean that it is the employer which is initiating the arbitration?

Name	Hire date	Termination date	Date Arbitration Agreement signed.
Aviles, Carlos	04/02/12	02/07/13	04/03/12
Ba, Senynabou	01/31/11	06/22/11	02/23/11
Name	Hire date	Termination date	Date Arbitration
Blackman, Cherrie	02/21/11	Active	02/21/11
Brenes, Siro	10/15/07	03/26/11	10/22/07
Burnett, Robert	09/27/10	07/25/13	10/07/10
Dejesus, Reuben	06/06/10	12/16/10	06/08/10
Edwards, Dennis	12/17/12	06/30/13	12/17/12
Feliciano, Victor	11/05/07	10/15/11	12/20/10
Foutika, Claudie	01/03/11	03/20/12	01/24/11
Galvan, Lisandro	10/17/11	08/09/12	11/11/11
Garcia, Rosa	02/11/13	07/12/13	03/04/13
Hague, Mohamed	01/02/08	05/13/08	01/02/08
Herard, Danielle	02/07/11	07/01/11	02/07/11
Krynska, Monika	04/08/13	11/18/13	04/08/13
Lewis, Tamika	12/17/12	05/19/13	12/17/12
Marte, Fiordalisa (nee Martinez)	09/24/07	12/17/08	10/02/07
McCendon, Sekou	12/17/12	04/28/13	12/17/12
Ratna, Carmelita	05/21/12	02/02/13	05/31/12
Serrano, Victor	08/17/09	05/29/10	09/09/09
Suarenz, Camilo	11/06/12	06/22/13	11/14/12
Torres, Janira	08/03/09	10/27/11	08/22/09
Zelaya, Miriam	04/08/13	Active	04/08/13

There are more than 100,000 current and former employees of the Respondents and their subsidiaries who have been covered by the Arbitration Agreement. Since 2011, there have been approximately 2500 cases which have begun the individual dispute resolution and been resolved both prior to and at arbitration, including cases involving supervisors and managers who are not covered by the National Labor Relations Act.

On or about February 1, 2013, the Honorable Dennis R. Hurley issued a Memorandum Decision & Order compelling arbitration in *Torres v. United Health care Services, Inc*., 920 F. Supp. 2d 368 (E.D.N.Y. 2013).

On or about December 2, 2013, Maxim Litvinov filed a class action complaint in the United States District Court for the Southern District of New York alleging violations of the Fair Labor Standards Act (FLSA) This is captioned *Maxim Litvinov, on behalf of himself and all others similarly situated, against UnitedHealth Group Inc*., Case 13-Civ.08541-KBF.

On January 3, 2014, Tamika Lewis, an employee, filed a written consent with the United States District Court for the Southern District of New York, to join in the law suit filed by Litvinov, described above.

On February 12, 2014, UnitedHealth Care Group filed a Motion with the United States District Court for the Southern District of New York in the above described matter seeking to dismiss the claim of Litvinov and the one opt-in plaintiff, Lewis, and to compel them to arbitrate their claims individually pursuant to the terms of the Arbitration Agreement.

On or about March 11, 2014, the Honorable Katherine B. Forrest issued a Memorandum Decision & Order enforcing the Arbitration Agreement and compelling arbitration of the Litvinov suit. 2014 WL 1054394 (S.D.N.Y. March 11, 2014).

III. Analysis

It should be kept in mind what is *not* being decided here. We are not being asked to decide what would happen if a group of employees or a single employee on behalf of a group, disavowed the arbitration agreement, asserting that because it has no finite duration, it is terminable at will by either side. Nor are we being asked to decide what would happen if employees who file a class action lawsuit, (or disavow the arbitration agreement before doing so), are discharged on that account. Could the employer in such circumstance declare that by filing, or expressing an intention to file a class action lawsuit, the employees involved had breached their employment agreements and therefore could be discharged without violating Section 8(a)(1) of the Act?

The Respondents contend that the Complaint is barred by the Statute of Limitations set forth in Section 10(b) of the Act. In this regard, it is noted that the Policy was initiated more than six months before the charge was filed. Also, all of the individual employees cited in the charge executed arbitration agreements more than six months prior to the filing of the charge.

Nevertheless, the Complaint alleges and the Respondents concede that the arbitration policy is currently in force and effect. Indeed, the evidence here shows that after the filing of the charge, and before the issuance of the Complaint, the Respondents have successfully sought to enforce the policy by filing Motions in the Federal District Courts to compel arbitrations on an individual basis.

The Complaint essentially alleges a "continuing" violation of the Act and the Board has consistently held that an agreement entered into outside the 10(b) period may be found to be unlawful if the provisions are unlawful and are being enforced within the 10(b) period. *Control Services*, 305 NLRB 435, fn. 2 (1991) enfd. 961 F.2d 1569 (3d Cir. 1992); *Teamsters Local 293 (R.L. Lipton Distributing*), 311 NLRB 538, 539 (1993; and *Whiting Milk Corp*., 145 NLRB 1035, 1037-1038 (1964).

Indeed, the Board has held that even where an employer's published rules restricting union or concerted activity, were enacted and not enforced within the 10(b) period, it will violate the Act merely by maintaining such rules in existence. *Carney Hospital*, 350 NLRB 627, 640 (2007).

The Respondents assert that the provisions of the Policy are not illegal because among other things, various Circuit Courts have ruled that substantially similar provisions are not violative of the NLRA. This presents a chicken and egg problem because it is the General Counsel's position that the provisions of the Policy are facially illegal and the Respondents' position is that they are not. Thus, the two questions are inextricably linked and if the General Counsel is correct, then the Respondents' 10(b) defense cannot prevail. But if the Respondents are correct on the merits, then it need not rely on Section 10(b).

The Respondents argue that because two Federal District Judges have already concluded that the arbitration agreements are valid under the Federal Arbitration Act, the Board is collaterally estopped from challenging that conclusion in this case. I don't agree.

For one thing, the Board was not a party in those cases and therefore it is not bound by the legal conclusions of those cases. In *Field Bridge Associates*, 306 NLRB 322, (1992), the Board stated:

> The Board adheres to the general rule that if the Government was not a party to the prior private litigation, it is not barred from litigating an issue involving enforcement of Federal law which the private plaintiff has litigated unsuccessfully. *Allbritton Communications*, 271 NLRB 201, 202 fn. 4…. Underlying this rule is the long-recognized principle that "Congress has entrusted to the Board exclusively the prosecution of the proceeding by its own complaint, the conduct of the hearing, the adjudication and the granting of appropriate relief. The Board as a public agency acting in the public interest, not any private person or group, not any employee or group of employees, is chosen as the instrument to assure protection from the described unfair conduct in order to remove obstructions to interstate commerce." *Amalgamated Utility Workers v. Consolidated Edison Co*., 309 U.S. 261, 265 (1940). See also National Licorice Co., v. NLRB, 309 U.S. 362-3364 (1940)…. Thus the Board, as a public agency asserting public rights should not be collaterally estopped by the resolution of private claims asserted by private parties…. In this case, the Board was not a party to the New York State Court proceedings. Accordingly, we decline to give them a preclusive effect.

The Respondents assert that Board could have been a party to the private actions filed by Litvinov and Torres and therefore should be estopped. It is legally possible for the Board, through its General Counsel, to intervene in a lawsuit having been filed in a state or federal court of first impression. But that has occurred in exceptionally few instances and only in the most compelling of circumstances. There is nothing in the Statute which would require the Board to intervene in any private law suit which could impact on issues covered by the NLRA.

The Respondents contend that by trying to prevent them from seeking judicial enforcement of the arbitration and non-class action agreements, the Board is violating the Respondents' First Amendment rights to petition to the government. In this regard, the Respondents cite *Bill Johnson's Rests v. NLRB*, 461 U.S. 731-743 (1983) and *BE & K Construction Co. v. NLRB*, 536 U.S. 516 (2002). [5]

The immediate question before the Supreme Court in *BE & K* was whether an unsuccessfully completed lawsuit could be the basis for the Board to find that an employer violated 8(a)(1) of the Act. In *BE & K,* the employer responded to a union's campaign and lawsuits against it by filing a lawsuit of its own. Ultimately, all of the counts in the employer's lawsuit were dismissed or withdrawn. After the BE & K's suit was concluded, two of the union-defendants filed charges with the NLRB contending that by filing and maintaining the lawsuit, BE & K had violated Section 8(a)(1). The Board found that the employer had violated the Act and ordered it to reimburse the unions for their attorney fees.

The Supreme Court unanimously invalidated the Board's standard for imposing unfair labor practice liability on employers who file lawsuits against unions. It concluded that even if a lawsuit was motivated by retaliatory reasons and even if it was ultimately unsuccessful, a

[5] Somewhat ironically, the Respondent's main point is that through private agreements, it should be allowed to require employees to forego their right to petition the courts.

lawsuit could *not* be grounds for an unfair labor practice if it had some reasonable basis. That is, the Court indicated that in order to have a reasonable basis, the plaintiff in such a lawsuit needs to only show that he is trying to stop conduct he reasonably believes is illegal. The standard set out by the Court was that the plaintiff's belief be "genuine both objectively and subjectively." The only possible exception is a lawsuit that is shown to constitute "sham litigation." [6]

Notwithstanding the above, the Supreme Court at footnote 5 in *Bill Johnson*, made what it described as an exception to the above described rule. [7] The Court stated;

> It should be kept in mind that what is involved here is an employer's lawsuit that the federal law would not bar except for its allegedly retaliatory motivation. We are not dealing with a suit that is claimed to be beyond the jurisdiction of the state courts because of federal-law preemption, or a suit that has an objective that is illegal under federal law. Petitioner concedes that the Board may enjoin these latter types of suits…. Nor could it be successfully argued otherwise for we have upheld Board orders enjoining unions from prosecuting court suits for enforcement of fines that could not lawfully be imposed under the Act, *Granite State Joint Board, Textile Workers Union*, 187 NLRB 636, 637, enforcement denied, 446 F.2d 369, revd. 409 U.S. 213; *Booster Lodge No. 405* 185 NLRB 380, 385, enforced 459 F.2d 1143, aff'd 412 U.S. 84, , and this Court has concluded that, at the Board's request, a District Court may enjoin enforcement of a state-court injunction "where [the Board's] federal power pre-empts the field." *NLRB v Nash-Finch Co*., 404 U.S. 138, 144. [8]

So how should we read footnote 5?

There is a category of cases where an employer, by means of a lawsuit, has directly sought to prevent employees from having access to the Board's processes. In such cases, it is typically alleged that a person or persons have maliciously filed charges with the NLRB or have furnished false statements or affidavits to the agency. Such lawsuits are almost always without merit and should be preempted by the supremacy clause of the Constitution. While such suits would typically be baseless and motivated by retaliatory considerations, their mere filing would reasonably be expected to have a chilling effect on the right of people to have access to the Board's processes. [9] In other words, such a lawsuit is a direct attempt to prevent the Board from carrying out its statutory mandate and can be viewed as an attempt by a private party to

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[6] This concise description of the Court's decision may be a bit abrupt inasmuch as there were three separate opinions by the Court. Justice O'Connor wrote the opinion of the Court. Justice Breyer wrote a concurrence on behalf of himself and Justices Souter, Ginsberg, and Stevens. Justice Scalia wrote a concurrence on behalf of himself and Justice Thomas.

[7] There is no indication in *BE & K* that the Court intended to overrule or eliminate the *Bill Johnson* footnote 5

[8] In *NLRB v Nash-Finch*, 78 LRRM 2967, the Supreme Court held that the NLRB has implied authority to obtain a federal court injunction to enjoin enforcement of a state court injunction regulating peaceful picketing by a union on preemption grounds.

[9] Consider the time, expense and anxiety of defending even a frivolous lawsuit that is ultimately dismissed by a judge before a trial. One must file an Answer; file and respond to pre-trial motions; answer interrogatories; produce documents; and give testimony under oath in pre-trial depositions. When one considers the scope of the pre-trial questions that may be posed in a civil suit, one can see that being a defendant in a civil action is no small matter.

nullify the Board's jurisdiction insofar as it affects that party. See for example, *LP Enterprises* 314 NLRB 580 (1994) and *Manno Electric, Inc*. 321 NLRB 278 (1996).

There is another category of cases which, in my opinion, would fit within the footnote 5 exception. These involve cases where the underlying acts constitute unfair labor practices and the lawsuit is simply an attempt to enforce the underlying act. The cases cited by the Supreme Court in footnote 5, involved situations where a union was alleged to have violated Section 8(b)(1)(A) of the Act by fining employee/members and the lawsuits were simply the mechanism to enforce and collect the fines. Along equivalent lines there are cases where a union is charged with violating Section 8(b)(4) and 8(e) of the Act when it seeks to enforce a contract provision that is itself illegal under the hot cargo provisions of the Act. In such cases, as the underlying contract is either facially illegal or would be illegal as enforced, a lawsuit or grievance seeking to enforce such an illegal contract provision would itself be illegal under the footnote 5 exception of *Bill Johnson's*. Thus, in *Elevator Constructors (Long Elevator*), 289 NLRB 1095, (1988), the Board held that a Union violated Section 8(b)(4)(ii)(A) by filing a grievance that was predicated upon a reading of the collective bargaining agreement that, if successful, would have resulted in a de facto hot cargo clause. That is, had the grievance been successful and had it been enforced by a Court, the order issued would have been one that was a violation of Section 8(e). The Board stated:

> Because we have concluded that the contract clause as construed by the Respondent would violate Section 8(e), we may properly find the pursuit of the grievance coercive, notwithstanding the Supreme Court's decision in *Bill Johnson's Restaurant v. NLRB*, 461 U.S. 731 (1983). Although holding that the Board could not enjoin, as an unfair labor practice, the lawsuit at issue in that case, the Court expressly noted that it was not dealing with a "suit that has an objective that is illegal under federal law." 461 U.S. at 737 fn. 5. See also *Teamsters Local 705 v. NLRB (Emery Air Freight*), 820 F.2d 448 (D.C. Cir. 1987) (distinguishing between having an unlawful motive in bringing a lawsuit and seeking to enforce an unlawful contract provision).

Finally, there are cases involving an attempt by an employer, via a lawsuit, to prohibit peaceful picketing or solicitation. Three cases discussing this type of situation are *Loehmann's Plaza*, 305 NLRB 663, (1991), *Riesbeck Food Markets*, 315 NLRB 940, (1994) enf'd denied 153 LRRM 2320 (4th Cir. 1996), and *Be-Lo Stores*, 318 NLRB 1, 12 (1995) enf'd denied, 156 LRRM 2261, 2274 (4th Cir. 1997).

In *Loehmann's Plaza*, the Board dealt with two related issues. The first was whether the Respondent's demands that union representatives cease engaging in area standards picketing and handbilling on private property in front of entrances of the target employer at a shopping mall, was a violation of Section 8(a)(1). In finding a violation, the Board applied the balancing test of *Jean Country*, 291 NLRB 11 (1988) and concluded that although the area standards picketing and handbilling was not at the strong end of Section 7 rights, it was worthy of accommodation. In that case, the Board found that the Union's alternative means of communicating its message was not reasonable.

The second issue in *Loehmann's Plaza*, was whether the Respondent violated Section 8(a)(1) by filing a state court lawsuit seeking injunctive relief. The General Counsel contended that the filing of the lawsuit was an unfair labor practice because under footnote 5 of *Bill Johnson's,* the lawsuit was a preempted case and therefore excluded from the general principles of *Bill Johnson's*. After discussing the Supreme Court's decisions in *Sears, Roebuck & Co., v. Carpenters*, 436 U.S. 180 (1978) and *Longshoremen ILA v. Davis*, 476 U.S. 380

(1986), (both dealing with the issue of preemption and peaceful picketing), the Board concluded that unless and until the NLRB's General Counsel issues a complaint alleging as an unfair labor practice, the filing of a lawsuit seeking a remedy against peaceful picketing, that lawsuit cannot be considered to be preempted within the meaning of footnote 5 and therefore the complaint should be dismissed unless the General Counsel can show that the lawsuit was baseless *and* motivated by retaliatory reasons. (That is, the complaint must be evaluated under the general *Bill Johnson's* standards and not the footnote 5 exceptions). On the other hand, the Board also concluded that once the General Counsel issues a Complaint alleging that the lawsuit is an unfair labor practice, the Respondent will violate the Act by continuing to prosecute the lawsuit, because it is now on notice that the subject matter of the lawsuit is preempted. The Board stated:

> A different analysis is warranted with respect to the Respondent's post-complaint pursuit of the state court lawsuit. The Respondent's prosecution of the suit during that time period need not be evaluated under *Bill Johnson's* because the suit was preempted and thus fell within the footnote 5 exception to the Court's decision. For the reasons stated below, we find that there is a sound basis for applying a different rule to a preempted lawsuit alleged to violate Section 8(a)(1) of the Act.

As illustrated by that case, a respondent pursuing a state court action seeking to enjoin alleged trespassatory union picketing has a right, without being initially preempted, to seek adjudication of its property rights. However, once the General Counsel decides to initiate a formal adjudicatory proceeding, the Board's jurisdiction is invoked and it becomes the exclusive forum for an adjudication of a respondent's property rights. Because at that point the state court tribunal "has no power to adjudicate the [preempted] subject matter," any attempt to continue the litigation necessarily amounts to pure harassment, i.e., an effort to subject the defendant or defendants in the lawsuit to litigation costs and burdens before a tribunal that indisputably lacks jurisdiction over the matter at that time. (footnotes omitted).

In *Riesbeck Food Markets*, 315 NLRB 940, (1994) enf'd denied 153 LRRM 2320 (4th Cir. 1996), the Board dealt with a situation similar to that in *Loehmann's Plaza* and which involved, *inter alia,* allegations that the Respondent violated 8(a)(1) by **(1)** denying access to private property by union pickets and handbillers and **(2)** prosecuting a state lawsuit seeking to limit peaceful picketing and handbilling activity to public property. In that case, a Board majority concluded that where a lawsuit involves a matter which is preempted, the Respondent "has an affirmative duty to take action to stay the state court proceedings following issuance of the Board complaint."

In *Be-Lo Stores*, 318 NLRB 1, 12 (1995), the Board found, among other things, that the Respondent violated the Act by denying union non-employee picketers access to private property in order to engage in solicitation and also violated the Act by maintaining a state trespass lawsuit after the General Counsel issued a complaint alleging that the denial of access was unlawful. Citing *Loehmann's Plaza*, the Board found that the continuation of the lawsuit, after the complaint was issued violated Section 8(a)(1) and ordered the Respondent to reimburse the Union for litigation expenses incurred in the State Court proceeding. On appeal, the Court refused to enforce this aspect of the Board's Order. *Be-Lo Stores v. NLRB*, 156 LRRM 2261, 2274 (4th Cir. 1997). In this regard, the Court held that the Respondent did not violate Section 8(a)(1) by denying access for solicitation and picketing and therefore the lawsuit seeking an injunction could not violate the Act.

It seems to me that the bottom line in all of this is that if the arbitration agreements that the Respondents have required employees to execute are illegal on their face, then an attempt to enforce those agreements through legal proceedings, would be a violation of Section 8(a)(1) of the Act and would fit into the footnote 5 exception in *Bill Johnson*. And like the discussion of Section 10(b), we have the same chicken and egg problem. If the agreements are lawful, then a lawsuit to enforce them would be lawful. But if the agreements are ultimately construed to be unlawful, then a lawsuit to enforce them would not be protected by the Supreme Court decisions in *Bill Johnson* and *BE &K*.

The General Counsel argues that the present case is controlled by the Board's decision in *D.R. Horton Inc*., 357 NLRB No. 184, enf. denied, 737 F.3d 344 (5th Cir. 2013). And if it was decided at a time when there was a proper quorum, then the General Counsel would be correct because notwithstanding contrary Circuit Court decisions, I am bound to follow the Board's view of the law until such time as it either changes its collective mind or is compelled to alter its view in light of a contrary decision by the Supreme Court. *Pathmark Stores*, 342 NLRB 378 fn. 1 (2004); *Waco Inc*. 273 NLRB 746, 749 fn. 14 (1984).

With respect to *D.R. Horton*, the Respondents assert that the decision in that case was issued on January 3, 2012 and that pursuant to the rationale in the Supreme Court's decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550, (June 26, 2014), there were only two validly appointed members of the Board and therefore there was no quorum as required in *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010). Specifically, it is argued that Member Becker's appointment to the Board had expired by that date.

In *Noel Canning,* the Court's actual finding was that appointments made during a three day period beginning on January 4, 2012 were unconstitutional. That decision did not purport to decide the validity of the Board's composition at any time prior to that date and therefore it did not directly affect the composition of the Board at the time that the decision in *D.R. Horton* was issue; January 3, 2012.

It seems that the Respondents are not seriously challenging the initial appointment of Member Becker which was made on March 27, 2010 during an intracession recess during the Second Session of the 111th Congress, occurring from March 26 to April 12, 2010. What they are asserting is that this appointment would have expired at the end of the First Session of the 112th Congress on December 30, 2011. They argue that on December 30, the Senate adjourned until the Second Session of the 112th Congress was to reconvene at noon on January 3, 2012. In this regard, the Respondents cite Article II, Section 2 of the Constitution to the affect that, "the President shall have the power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session." The question, as I see it, is how we define the words, "next session."

It seems to me that this is an issue that the Board and any reviewing Courts will have to deal with, irrespective of my opinion as to the merits of this argument. Read literally, as a term of art, the constitutional provision could mean that Becker's term should have expired at the end of December 2011 and before the Board issued its decision in *D.R. Horton*. But read in more colloquial terms, it could be interpreted that the Senate's action by convening "pro forma sessions" during a hiatus, was in reality, extending the existing session so that Becker's term never actually expired.

However, interpreted, I think that even if not construed as binding precedent, the Board, with its current composition is likely to reaffirm the *D.R. Horton* decision. I therefore think that I should give it substantial if not controlling deference.

This brings us finally to the decision in *D.R. Horton* and the respective arguments as to whether the provisions of the Federal Arbitration Act trump the provisions of the NLRA insofar as allowing enforceable agreements whereby employees as a condition of continued employment, are required to waive certain rights to take collective actions. In this case, to file class action lawsuits relating to their wages and hours pursuant to yet another statute; the Fair Labor Standards Act.

Without weighing in on the arguments for or against the Board's decision in *D.R. Horton*, I nevertheless think that the Board's rationale is reasonable and likely to be reaffirmed. (What the Circuit Courts do is another matter). Therefore, I am going to conclude that by maintaining its arbitration policy and by enforcing arbitration agreements through Court proceedings, the Respondents have interfered with the rights of employees to engage in collective actions for their mutual aid and protection and that the Respondents have therefore violated Section 8(a)(1) of the Act.

The Remedy

As it concluded that the Respondents have unlawfully maintained an Arbitration Policy that precludes class or collective actions by employees, I shall recommend that they be ordered to rescind or revise that policy to make it clear to employees that the Policy and agreements made pursuant to the Policy do not constitute a waiver in all forums of their rights to maintain class or collective actions relating to their wages, hours or other terms and conditions of employment. I shall also recommend that the Respondents be required to notify its employees of the rescinded or revised Policy.

Because the Arbitration Policy has been and continues to be maintained throughout the United States, it recommended that the Respondents be ordered to post the attached Notice at all locations where the Policy has been or is still in effect.

To the extent that the Charging Parties have incurred litigation expenses relating to the Respondents' Motions to dismiss the class actions and to compel arbitration under those agreements made in conformance with the Arbitration Policy, it is recommended that the Respondents reimburse the Charging Parties for such expenses with interest as determined in *Kentucky River Medical Center*, 356 NLRB8 (2010, enf. Denied on other grounds, sub. Nom. *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (DC Cir. 2011).

Additionally, it is recommended that the Respondents be required to file Motions with the United States District Court in *Litvinov v. UnitedHealth Care Group Inc.*, and *Torres v. United Healthcare Services Inc.*, requesting the withdrawal of their motions to dismiss those actions and to compel arbitration of the claims made in those lawsuits.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended [10]

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondents, UnitedHealth Group and UnitedHealth Care Services Inc., their officers, agents, successor, and assigns, shall

1. Cease and Desist from

(a) Maintaining or enforcing the "UnitedHealth Group Employment Arbitration Policy" and any agreements made with employees pursuant to that Policy that waives the right to maintain class or collective action.

(b) Enforcing such agreements by filing Motions in Court to dismiss or stay collective action lawsuits and to compel individual arbitration, pursuant to the terms of such agreements.

(c) Requiring employees to sign binding arbitration agreements that prohibit collective or class litigation.

(d) In any like or related manner, interfering with, restraining or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind or revise the Arbitration Policy that requires employees to waive their right to maintain employment related class and collective claims in all forums, whether arbitral or judicial;

(b) Withdraw any pending motions for individual arbitration in which Respondents seek enforcement of the Arbitration Policy's unlawful restriction on class or collective claims; or if such motions have already been granted, move the appropriate court to vacate any orders for individual arbitration and reimburse employees for any litigation expenses including attorney's fees, directly related to opposing Respondents' motions to compel individual arbitration.

(c) Within 14 days after service by the Region, post at its locations nationwide where the Arbitration Policy has been promulgated, maintained or enforced copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 2 after being signed by the Respondents' authorized representative, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to the physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and /or other electronic means, if the Respondents customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In addition, a copy of this notice will be made available to employees on the same basis and to the same group or class of employees as the Arbitration Policy was made available to them. In the event that, during the pendency of these proceedings, the Respondents have gone out of business or closed the facility involved in these proceedings, the Respondents shall

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since July 10, 2012.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 5, 2014

_____
Raymond P. Green
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.
To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT maintain or enforce the "UnitedHealth Group Employment Arbitration Policy" and any agreements made with employees pursuant to that Policy that waives the right to maintain class or collective action.

WE WILL NOT pursuant to the terms of such agreements enforce them by filing Motions in Court to dismiss or stay collective action lawsuits and to compel individual arbitration.

WE WILL NOT require employees to sign binding arbitration agreements that prohibit collective and class litigation.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce employees in the exercise of their rights under Section 7 of the Act.

WE WILL withdraw any pending motions for individual arbitration in which the Respondents seek to enforce the Arbitration Policy's unlawful restriction on class or collective claims; or if such motions have already been granted, move the appropriate court to vacate any orders for individual arbitration.

WE WILL reimburse employees for any litigation expenses including attorney's fees, directly related to opposing Respondents' motions to compel individual arbitration.

UnitedHealth Group and
UnitedHealth Care Services Inc
(Employer)

Dated _____ **By** _____
(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under

the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

26 Federal Plaza, Federal Building, Room 3614

New York, New York 10278-0104

Hours: 8:45 a.m. to 5:15 p.m.

212-264-0300.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/02-CA-118724 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 212-264-0346.